Krishnan Kutty a/l Sanguni Nair v Telekom Malaysia Kawasan Utara & Anor

HIGH COURT (IPOH) — ORIGINATING MOTION NO 21–44 OF 1997
KANG HWEE GEE J
15 SEPTEMBER 1999

Evidence *— Admissions — Admissions by dismissed employee — Whether must be in writing and signed by employee*

Evidence *— Burden of proof — Standard of — Charge against applicant — Industrial Court applied standard of balance of probabilities — Whether amounts to an imfringement of constitutional right of applicant — Whether decision of Industrial Court must be quashed*

Labour Law *— Industrial Court — Procedure — Standard of proof — Dismissal — Charge against applicant — Admission of impropriety by applicant, whether must be in writing and signed by applicant — Industrial Court applied standard of balance of probabilities — Whether amounts to an imfringement of constitutional right of applicant — Whether decision of Industrial Court must be quashed*

The applicant filed an originating motion for an order of certiorari to quash the award of the Industrial Court dismissing his claim that he had been unjustly dismissed. The evidence before the Industrial Court was that the applicant had taken the sum of RM5,168.77 in cash from the payments made by customers who came to settle their bills through the Nixdorf machines at the payment counter of which the applicant was one of the operators. He was alleged to have issued seven bad cheques belonging to Natkunasingam to an amount equivalent to the sum of RM5,168.77 which he had taken from the machine. The seven cheques were later dishonoured by the bank when it was later presented for payment into the respondent's account. The senior officer of the respondent (COW-5) gave evidence that the applicant had admitted taking the cash and substituting the cheques in its place. After hearing the evidence of the witnesses called before it, the Industrial Court found by the civil standard of balance of probabilities that the charge against the applicant was proved. The applicant contended that the Industrial Court had erred in law and fact and the decision reached was unreasonable and irrational on the grounds, inter alia: (i) no written confession had been made by the applicant; (ii) there was no such evidence from the notes of evidence that the wife of the applicant had pleaded for leniency from COW-5; and (iii) the Industrial Court had applied the wrong burden of proof in finding the applicant guilty of the charge.

Held, quashing the award of the Industrial Court with a directive that the charge be reheard and determined by the higher standard of beyond reasonable doubt:

(1) The Industrial Court had properly considered the evidence of the witnesses appearing before it and had come to the right

conclusion with respect to the culpability of the applicant at least on basis of the civil standard of balance of probabilities. The Industrial Court was perfectly entitled to come to its own finding of fact as stated in its award. In particular, it was perfectly at liberty to accept the evidence of the issuer of the cheques Natkunasingam alone to conclude that the cheques were issued by Natkunasingam in preference over any other evidence which may indicate otherwise (see p 406A–B).

(2) Having examined the notes of evidence recorded before the Industrial Court, in particular the testimony of COW-5 herself, the court was unable to find any evidence that supported the Industrial Court's finding that the applicant's wife had approached COW-5 to plead for leniency. Therefore, there was absolutely no evidence for the Industrial Court to have come to this conclusion. However, the error was purely factual in nature which arose from misconception over the existence of a particular fact which did not affect the gravamen of the charge. It was not as such error of law of the variety that went to jurisdiction within the meaning of illegality or irrationality that would require judicial intervention (see p 406B–E).

(3) Having examined the testimony of COW-5 in the context in which the admission was made, the court was convinced that the applicant had admitted that he had taken the money and had substituted the seven cheques in its place. Contrary to what was submitted by the applicant, it was absolutely incorrect to say that an admission must be in writing and must be signed by the applicant. In law, the acceptance of an admission depends on its cogency and not on its form. In the absence of any evidence that it was not given voluntarily, the Industrial Court was entitled to act on this admission alone to decide on the culpability of the applicant. The law is quite clear — the acceptance of the evidence of a witness cannot be subjected to a review (see pp 406H–407A).

(4) In the circumstances, there was no element of irrationality or illegality in the finding of the Industrial Court. Its finding of facts was logically probative and therefore could not be impeached (see p 407D–E).

(5) Despite having creditably assessed the evidence before him, it was clear that the Industrial Court had applied the incorrect test of balance of probabilities to come to the finding that the charge against the applicant had been proven and to thereby conclude that his dismissal by the respondent was justified. In cases where a tribunal finds a person guilty of a charge involving elements of dishonesty such as in the present case, it must be satisfied of that person's guilt beyond a mere balance of probabilities (see p 407E–G).

(6) An inferior tribunal charged with the responsibility of deciding on the guilt of a person, is obliged to apply the same test of proof

beyond reasonable doubt by virtue of art 5(1) of the Federal Constitution. In applying the lower of proof, the Industrial Court had impinged on the constitutional right of the applicant and in the process, committed an error of law. Having found that an error of law had been committed by the Industrial Court, it follows that its decision must accordingly be quashed (see pp 407I, 409C, 410G).

(7) The inherent jurisdiction of the court involves the exercise of judicial discretion which must be founded on some compelling reasons that require the intervention of the court in the interest of justice. It follows therefore a consequential order need not follow in all cases where the decision of the inferior tribunal is quashed. In the present case, there was no compelling reason why a consequential order should be made in favour of the applicant. Having examined the substance of the award of the Industrial Court, it was clear that there were sufficient materials to find the charge against the applicant proved on a preponderance of probabilities — and possibly even on the higher balance of beyond reasonable doubt. The only reason why the award had to be quashed was because by applying the lower standard, the fundamental right of the applicant to be heard by the higher standard had been infringed which constituted an error of law. To order the respondent to reinstate or to compensate the applicant under the circumstances, would be most inappropriate, unjust and irrational (see pp 411E–F, 412A–C).

[Bahasa Malaysia summary

Pemohon telah memfailkan saman pemula untuk suatu perintah certiorari untuk membatalkan award Mahkamah Perusahaan yang menolak tuntutannya bahawa beliau dipecat secara tidak adil. Keterangan di hadapan Mahkamah Perusahaan adalah bahawa pemohon telah mengambil jumlah RM5,168,77 secara tunai daripada pembayaran yang dibuat oleh para pelanggan yang datang untuk menyelesaikan bil-bil mereka melalui mesin Nixdorf di kaunter pembayaran di mana pemohon adalah salah seorang daripada operator. Beliau dikatakan telah mengeluarkan enam cek tak laku milik Natkunasingam yang berjumlah RM5,168.77 yang beliau telah ambil daripada mesin tersebut. Kemudian tujuh cek tersebut tidak ditunaikan oleh bank tersebut apabila ia dikemukakan untuk pembayaran ke akaun responden. Pegawai kanan responden (COW-5) telah memberikan keterangan bahawa pemohon telah mengaku mengambil wang tunai tersebut dan menggantikan cek-cek tersebut. Selepas mendengar keterangan saksi-saksi yang dipanggil, Mahkamah Perusahaan mendapati bahawa di atas imbangan kebarangkalian, tuduhan terhadap pemohon telah dibuktikan. Pemohon menegaskan bahawa Mahkamah Perusahaan telah silap dari segi undang-undang dan fakta dan bahawa keputusan yang dicapai

adalah tidak munasabah dan tidak rasional atas alasan-alasan, antara lain: (i) tiada pengakuan bertulis telah dibuat oleh pemohon; (ii) tidak terdapat keterangan daripada nota-nota keterangan bahawa isteri pemohon telah meminta hukuman ringan daripada COW-5; dan (iii) Mahkamah Perusahaan telah memakai beban membukti yang salah di dalam penemuan kebersalahan pemohon terhadap tuduhan tersebut.

Diputuskan, membatalkan award Mahkamah Perusahaan dengan arahan bahawa tuduhan tersebut didengar semula dan diputuskan dengan ujian sehingga tiada keraguan munasabah:

(1) Mahkamah Perusahaan telah mempertimbangkan dengan wajar keterangan saksi-saksi di hadapannya dan telah mencapai kesimpulan yang betul berkenaan dengan kesalahan pemohon sekurang-kurangnya berdasarkan standard sivil atas imbangan kebarangkalian. Mahkamah Perusahaan adalah berhak untuk mencapai penemuan faktanya sendiri seperti yang dinyatakan di dalam award. Secara khususnya ia berhak untuk menerima keterangan pengeluar cek Natkunasingam sahaja untuk menyimpulkan bahawa cek tersebut telah dikeluarkan oleh Natkunasingam, dan memberi keutamaan kepada keterangan ini berbanding dengan keterangan lain yang mungkin menyatakan sebaliknya (lihat ms 406A–B).

(2) Selepas memeriksa nota-nota keterangan yang direkodkan di hadapan Mahkamah Perusahaan terutamanya keterangan COW-5 sendiri, mahkamah tidak menemui apa-apa keterangan yang menyokong penemuan Mahkamah Perusahaan bahawa isteri pemohon telah bertemu COW-5 untuk minta hukuman diringankan. Oleh itu, tiada keterangan langsung bagi Mahkamah Perusahaan untuk sampai kepada kesimpulan tersebut. Namun demikian, kesilapan tersebut hanyalah kesilapan fakta yang timbul daripada tanggapan salah mengenai kewujudan suatu fakta yang tidak menjejaskan pertuduhan tersebut. Ia bukanlah suatu kesilapan undang-undang sehingga menjejaskan bidang kuasa di bawah maksud kepenyalahan undang-undang atau tidak rasional sehingga memerlukan campur tangan kehakiman (lihat ms 406B–E).

(3) Selepas memeriksa keterangan COW-5 di dalam konteks di mana pengakuan dibuat, mahkamah adalah pasti bahawa pemohon telah mengaku mengambil wang tersebut dan telah menggantikan tujuh cek-cek tersebut. Berbanding dengan apa yang dihujahkan oleh pemohon, adalah silap untuk mengatakan bahawa suatu pengakuan mestilah dalam bentuk bertulis dan ditandatangani oleh pemohon. Di dalam undang-undang, penerimaan suatu pengakuan adalah bergantung kepada keyakinan terhadapnya dan bukan kepada bentuknya. Apabila tidak terdapat keterangan bahawa ia tidak diberikan secara sukarela, Mahkamah Perusahaan berhak untuk bertindak atas pengakuan ini sahaja dan

memutuskan kebersalahan pemohon. Undang-undang adalah jelas — penerimaan keterangan seorang saksi tidak boleh tertakluk kepada kajian semula (lihat ms 406H–407A).

(4) Di dalam keadaan sedemikian, tiada elemen tidak rasional atau kepenyalahan undang-undang di dalam penemuan Mahkamah Perusahaan. Penemuan fakta-faktanya adalah secara logik mempunyai nilai-nilai keterangan dan dengan itu tidak boleh dicabar (lihat ms 407D–E).

(5) Walaupun telah menilai keterangan di hadapannya, adalah jelas bahawa Mahkamah Perusahaan telah silap memakai ujian imbangan kebarangkalian untuk mencapai penemuan bahawa tuduhan terhadap pemohon telah dibuktikan dan dengan itu menyimpulkan bahawa pemecatan beliau oleh responden adalah wajar. Di dalam kes-kes di mana tribunal mendapati seseorang bersalah berkenaan dengan suatu pertuduhan melibatkan elemen penipuan seperti kes ini, mestilah dipuaskan bahawa kebersalahan beliau adalah melampaui imbangan kebarangkalian semata-mata (lihat ms 407E–G).

(6) Suatu tribunal bawahan yang diberikan tugas untuk menentukan kebersalahan seseorang, mestilah memakai ujian yang sama iaitu melampaui keraguan munasabah menurut art 5(1) Perlembagaan Persekutuan. Di dalam memakai beban pembuktian yang lebih rendah, Mahkamah Perusahaan telah menjejaskan hak perlembagaan pemohon dan di dalam proses, melakukan kesilapan undang-undang. Oleh kerana suatu kesilapan undang-undang telah dilakukan oleh Mahkamah Perusahaan, keputusannya mestilah dibatalkan (lihat ms 407I, 409C, 410G).

(7) Bidang kuasa sedia ada mahkamah melibatkan pemakaian budi bicara kehakiman yang mesti berdasarkan atas alasan-alasan yang mendorong campur tangan mahkamah untuk kepentingan keadilan. Oleh itu, perintah berbangkit tidak perlu untuk semua kes-kes di mana keputusan tribunal bawahan dibatalkan. Di dalam kes ini, tidak terdapat sebab-sebab yang mendorong mengapa suatu perintah seterusnya yang memihak kepada pemohon perlu dibuat. Selepas mengkaji isi award Mahkamah Perusahaan, adalah jelas bahawa terdapat keterangan yang mencukupi untuk membuktikan pemohon bersalah di atas imbangan kebarangkalian — dan mungkin dengan menggunakan ujian melampaui keraguan munasabah. Alasan tunggal mengapa award mesti dibatalkan adalah kerana pemakaian standard yang lebih rendah. Hak asas pemohon untuk didengar dengan mengunakan standard yang lebih tinggi telah dilanggar dan ini terjumlah kepada kesilapan undang-undang. Untuk mengarahkan responden mengembalikan jawatan atau memberikan pampasan kepada pemohon di bawah keadaan-keadaan sedemikian, adalah tidak sesuai, adil atau rasional (lihat ms 411E–F, 412A–C).]

Notes

For cases on admissions, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 60–76.

For cases on burden of proof generally, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 158–359.

For cases on procedure of the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1111–1114.

Cases referred to

Ang Hiok Seng v Yim Yut Kiu [1997] 2 MLJ 45 (refd)

Bank Bumiputra (M) Bhd v Mohd Azli Abu Bakar [1997] 2 ILR 316 (refd)

Civil Service Unions v Minister for Civil Service [1985] AC 374 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & another appeal [1996] 1 MLJ 481 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama Serbaguna Sungai Gelugor [1999] 3 MLJ 1 (refd)

R Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 145 (refd)

Sabah Plantation Industry Employees' Union v Sama Subur Sdn Bhd, Tawau & Anor [1995] 2 MLJ 378 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

TA Miller Ltd v Minister of Housing and Local Government and Anor [1968] 2 All ER 633 (refd)

William Jack & Co (M) Sdn Bhd v S Balasingam [1997] 3 CLJ 235 (refd)

Legislation referred to

Federal Constitution art 5

Industrial Relations Act 1967 s 29(3)(a)

Rules of the High Court 1980 O 53 r 1(2)

Ajit Singh Jessy (*Pravin Kaur Jessy* with him) (*Jessy & Associates*) for the applicant.

Melvin Poi (*Azman Tahir & Co*) for the first respondent.

Kang Hwee Gee J: This is an originating motion by the applicant, a clerk at the bill payment counter of the first respondent, Telekom Malaysia Kawasan Utara, for an order of certiorari to quash the award of the Industrial Court made on 23 April 1997 dismissing the applicant's claim that he had been unjustly dismissed.

Leave to apply for the order under O 53 r 1 (2) of the Rules of the High Court 1980 had been obtained earlier by the applicant.

The facts justifying this application appears in the supporting affidavit of the applicant in Bahasa Malaysia. The relevant paragraphs read as follows:

(2) Responden pertama telah mengeluarkan tiga surat menunjukkan sebab kepada saya pada 10 November 1992 dan dua lagi pada 11 November 1992, dimana saya telah dituduh menipu Syarikat sebanyak RM5,168.77. Saya telah menafikan kesemua tiga tuduhan tersebut melalui surat saya yang bertarikh 15 November 1992.

(3) Pada 30 Disember 1992 responden pertama telah mengeluarkan satu Surat Pertuduhan kepada saya dan seterusnya saya telah dikehendaki menghadiri satu siasatan pada 14 Januari 1993. Tuduhan yang dikenakan keatas saya ialah saya telah menerima bayaran dalam bentuk wang tunai daripada pelanggan tetapi kemudiannya telah mengeluarkan cek-cek untuk menggantikan bayaran tersebut dan telah mengakibatkan kerugian sebanyak RM5,168.77 kepada Syarikat.

(4) Responden pertama telah memperkatakan yang saya telah melakukan salah laku yang serius di bawah Polisi Syarikat — 'Polisi Syarikat MPSTM-043 — kesalahan berat perkara 2 iaitu 'Mencuri atau menipu termasuk cuba mencuri atau mencuba menipu dalam keadaan yang berkaitan dengan harta benda 'Syarikat'.

(5) Saya didapati bersalah seperti yang dituduh dan pada 19 Februari 1993 saya telah dibuang kerja oleh Responden pertama.

(6) Pada 5 Mac 1993 saya telah menulis Surat Rayuan kepada Responden pertama tetapi rayuan saya telah ditolak pada 24 Jun 1993.

(7) Saya kemudiannya telah memfailkan satu aduan kepada Jabatan Perhubungan Perusahaan Taiping dan perkara tersebut telah didengarkan di Mahkamah Perusahaan Ipoh pada 17 Ogos 1994, 20 Julai 1994, 21 Julai 1994 dan 22 Julai 1994. Penghujahan Bertulis telah dibuat selepas perbicaraan.

The charge before the Industrial Court

The charge against the applicant which the Industrial Court chairman inquired into read as follows:

> Bahawa kamu Krishnan Kutty a/l Sanguni Nair No K/P 2553929 No KT A11495 sebagai seorang kerani Telekom Malaysia yang ditugaskan di Kaunter Kutipan Hasil Kedai Telekom Taiping di antara 1 Oktober 1992 hingga 5 Oktober 1992 dalam waktu bekerja telah menerima bayaran secara *tunai* dari pelanggan-pelanggan bagi menjelaskan bil-bil berikut:
>
> | Jenis Bil | Kuantiti Bil | Amaun Bil |
> |---|---|---|
> | Tenaga Nasional Bhd | 7 | RM1,201.25 |
> | Jabatan Bekalan Air | 3 | RM217.20 |
> | Telekom Malaysia Bhd | 24 | RM3,750.32 |
>
> dan meresitkan penerimaan pembayaran secara CEK yang mengakibatkan syarikat mengalami kehilangan hasil kutipan sejumlah RM5,168.77. Dengan ini kamu telah melakukan Kesalahan Berat sepertimana termaktub di bawah Polisi Syarikat MPSTM-043 — Kesalahan Berat Perkara 2 iaitu 'Mencuri atau menipu termasuk cuba mencuri atau mencuba menipu dalam keadaan yang berkaitan dengan harta benda Syarikat dan boleh diambil tindakan mengikut Artikel 64 Perjanjian Bersama 11/1992.

In substance, the evidence before the Industrial Court was that the applicant had taken the sum of RM5,168.77 as mentioned in the charge in

cash from the payments made by customers who came to settle their bills through the Nixdorf machines at the payment counter of which the applicant was one of the operators. He was alleged to have issued seven bad cheques belonging to Natkunasingam (COW-2) to an amount equivalent to the sum of RM5,168.77 which he had taken from the machine. The seven cheques were later dishonoured by the bank when it was later presented for payment into the first respondent's account.

The first respondent employer called nine witnesses.

The first witness, Anuar bin Mohd Ali (COW-1) an accounts assistant of the first respondent and the officer investigating the case against the complainant before the domestic enquiry held by the first respondent, gave evidence that the applicant was a counter-clerk at the material time and had access to the Nixdorf machine used for processing payment of bills for which the applicant has his own operator identification and secret password to operate the machine, along with the other counter clerks who were provided with their own operator identification and password.

There was no direct evidence to implicate the applicant with the theft of the money in question but the owner of the dishonoured cheques Natkunasingam (COW-2) was called to say that he had given the seven cheques to the applicant which were originally unfilled but pre-signed by him. He admitted that he had not paid any bills to the first respondent corresponding to the amounts in the seven cheques. He also said that the applicant had personally contacted him by phone to inform him that the cheques had bounced when presented for payment to the bank. He was told by the applicant not to go to the Kedai Telekom until the applicant had settled the amount on the cheques.

Three other witnesses who were customers of the first respondent, Timah (COW-6), Foo Ah Fook (COW-7) and Raja Som (COW-8) gave evidence that they had paid their bills in cash to the counter clerk. According to the Ketua Kedai Wan Hardiah (COW-4) who was supervising the applicant at the time of incident, by the document called audit roll which she had examined, their respective payments had been recorded as having been paid by cheques.

A crucial allegation was made by the senior officer of the first respondent, the Penolong Pengurus Pemasaran Rohani bte Ibrahim (COW-5) before the Industrial Court. She gave evidence that after having known of the dishonour of the seven cheques from the Ketua Kedai, she had called the applicant into her room to enquire why the applicant had held on to the cheques. At this meeting the applicant had admitted taking the cash as mentioned in the charge and substituting the cheques in its place. Her evidence in verbatim was as follows:

> I asked why he was holding back the bounced cheques and not giving them to the Ketua Kedai as in normal practice. He said that the cheques were issued by himself at the counter and then said that he received cash at the counter and then issued cheques according to the collection from the customers who actually paid in cash.

In his evidence the applicant denied having taken the money thereby causing the loss to the first respondent as stated in the charge. He denied

receiving the seven cheques from Natkunasingam (COW-2) and maintained that he had been falsely accused of having done so. He claimed that the only liaison he had with Natkunasingam was to attend to him when he came over to his counter to request for the return of his cheques after the incident. He referred Natkunasingam's request to the Ketua Kedai, Wan Hardiah, (COW-4) who then met and spoke to the former. He claimed that Wan Hardiah then handed cheques over to him with the instruction that they be handed over to Natkunasingam. Wan Hardiah then tore the advisory slips which had earlier been attached to the cheques.

He also denied that he had admitted orally to the Penolong Pengurus Pemasaran, Rohani (COW-5) that he had taken the cash in the manner described by her.

After hearing the evidence of the witnesses called before it, the Industrial Court chairman found by the civil standard of balance of probabilities that the charge against the applicant was proved. Accordingly, he dismissed the applicant's claim.

Consequently, on 23 April 1997 he issued Award No 179/97, upholding the dismissal of the applicant by the first respondent.

The complaints of the applicant

Since the Federal Court decision in *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145, a court undertaking a judicial review of an administrative decision is committed not only to review its decision making process but also the substance of its decision to determine whether it has been affected by any procedural impropriety, illegality, irrationality or proportionality within the respective meaning ascribed thereto by Lord Diplock in *Civil Service Unions v Minister for Civil Service* [1985] AC 374 (see *Samsuddin bin Saad v Pengarah Hospital Bahagia, Ulu Kinta* [1998] 7 MLJ 785 at p 796).

The applicant's complaints in this motion however, were not directed to the decision making process but to the substance of the award of the Industrial Court and may be summarised (following closely the words in the affidavit) as follows:

(1) The Industrial Court erred in law and fact when it made wrong conclusion based on strong and undisputed facts before it and therefore the decision reached was unreasonable and irrational. It was contended that the Court had reached an irrational decision that the applicant had misappropriated RM5,168.77 due to the first respondent inspite of being presented with the following undisputed facts before it:

(i) all the dishonoured cheques had belonged to COW-2 (the issuer of the cheques) and not the applicant;

(ii) all the subscribers COW-6, COW-7 and COW-8 (the customers) were unable to identify the applicant as the person to whom their bills and money were given to;

(iii) no evidence was adduced of the seven cheques;

(iv) no written confession had been made by the applicant; A

(v) no evidence was adduced that applicant had received cheques from COW-2; and

(vi) no evidence was adduced that applicant was seen receiving cash from customers and substituting it with cheques.

(2) The Industrial Court's decision was irrational as it had no basis to reach the decision based on the two sets of facts in para 25 and 34 of its award which read as follows: B

para 25 - 'She also told the court that the claimant's wife came to see her and pleaded leniency unto her husband. These are very serious allegations by this witness. However, the claimant chose not to rebut or challenge this evidence in cross-examination at all ... .' C

para 34 - 'that the wife of the claimant came to his office to plead for leniency is fatal for him.'

It was contended that there was no such evidence from the notes of evidence (encl 15) that the wife had pleaded for leniency from COW-5, the Penolong Pengurus Pemasaran, Puan Rohani. All that was in evidence in the notes of evidence was in Question 41 that: 'While claimant returned the money, his wife was with him together with the supervisor'. D

The Industrial Court erred in law and fact when it relied on the evidence of COW-2 (as stated in para 23 of the award) that he had given the applicant seven undated cheques when there was no evidence to prove that the applicant requested or received those cheques from COW-2. E

It was submitted that the burden was upon the party asserting to prove that the cheques were received by the applicant, that apart from the evidence of COW-2, there was no evidence to show that COW-2 had handed the cheques to the applicant, that COW-2 evidence should not be accepted as he was himself a suspect, and that his evidence should have been weighed against the applicant's denial that he had received the cheques from COW-2 and had paid cash to COW-2. F

The Industrial Court erred in law and fact in accepting the evidence of COW-5 that the applicant had admitted his guilt as stated in para 25 of the award when it failed to consider the applicant's evidence that he had at no time received cash and issued cheques in return. G

It was submitted that the applicant's admission of his guilt was not in writing and should not have been accepted, as the Industrial Court case of *Bank Bumiputra (M) Bhd v Mohd Azli Abu Bakar* [1997] 2 ILR 316 had ruled that 'if an admission had in fact been made it was incumbent upon COW-1 and COW-2 to record it and had it signed by either or both the claimant and CLW 2'. H

The Industrial Court erred in law and in fact in accepting the evidence of some of the customers (COW-6, COW-7 and COW-8) who had said they had paid for their bills in cash without confirming whether in fact the cash was paid to the applicant. In fact they had not identified specifically the person to whom their bills were being paid to. I

A It was submitted that no weight should have been attached to these evidence as it was irrelevant and by taking into consideration this evidence in para 33 of the award, the Industrial Court had committed an error of law.

The Industrial Court had applied the wrong burden of proof in finding the applicant guilty of the charge. It had applied the 'balance of probability' B test, when it should have applied the 'beyond reasonable doubt' test.

The substance of the award of the chairman

To decide whether there is any merit in the submission of counsel for the applicant, one must now examine the written decision of the learned C chairman called the award (CLWC-3 of encl 6).

The award, it is immediately discernible, is not structured in the form that one would expect from the judgment of a court of law such as the High Court. The award did not deal with the evidence taken before itself in detail and neither did it consider the law in any depth.

D But the Industrial Court is not a court of law and is not bound to act like one. It is essentially an inferior tribunal which owes its existence to s 21 of the Industrial Relations Act 1967. Unlike a court of law, which has to follow rigid rules of procedure and evidence, s 30(5) of the Act specifically provides that it 'shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal E form'. To quote the learned author of the third edition of his book *Administrative Law of Malaysia and Singapore*, MP Jain at p 203:

> The Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts. The court gives its award in circumstances peculiar to each dispute.

F The extent to which a tribunal may receive, weigh and decide on the evidence received by it was described by Lord Denning MR in the English Court of Appeal case of *TA Miller Ltd v Minister of Housing and Local Government and Anor* [1968] 2 All ER 633 at p 634 in the following words:

> Counsel for the appellants said that they ought not to have relied on it at all. It ought not even to have been admitted because it was hearsay. It was not on G oath, no opportunity was given to test it by cross-examination, and it was objected to. Counsel said that in these circumstances it was contrary to natural justice for it to be admitted.
>
> In my opinion this point is not well founded. A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are H applied. Most of the evidence here was on oath, but there is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law (see *R v Deputy Industrial Injuries Comr, Ex parte Moore* [1965] 1 All ER 81).

I But despite its shortcomings the award was nevertheless, a speaking judgment. Read as a whole it is fairly discernible that the learned chairman had applied his mind to the issue in question, that is to say whether the applicant was unjustly dismissed by the first respondent.

An analysis of the structure of the award discloses that:

(1) The learned chairman had found as facts that:

(i) the seven dishonoured cheques were received back from the bank by the applicant who had acknowledged receipt of them by initialling on the bank's despatch book.

(ii) the clerks including the applicant had their own secret password to the Nixdorf machine for the entry of payments.

(iii) COW-4 (the Ketua Kedai, Wan Hardiah) knew by checking with the machine that the cheques had been dishonoured. He then proceeded to the bank (Bank Bumiputra) to enquire about the dishonoured cheques.

(iv) the applicant had processed the payment, and had admitted to COW-4 that he had taken the cheques and would be responsible for them.

(v) COW-2 had given the seven cheques to applicant and that the applicant had told him he had wanted them for use as collateral to loans he had taken from his friends.

(vi) the applicant had telephoned COW-2 after the cheques were dishonoured and had told him not to go to the office until he had settled the money with the first respondent company.

(vii) contrary to what the applicant had claimed, the cheques had not been returned to COW-2.

(viii) COW-2 had not issued any cheques to any of the first respondent's customers to pay for their bills.

He had decided to accept these facts as proved mainly because the applicant had not cross-examined those witnesses who had presented those facts before him, which in my view is sufficient to indicate that he had indeed applied his mind to the issues essential to his findings.

(2) The learned chairman had accepted the evidence of Puan Rohani bte Ibrahim (COW-5) Penolong Pengurus Pemasaran, a senior officer of the first respondent that:

(i) she had called the applicant to her room to enquire about the cheques, and

(ii) applicant had informed her that he had taken cash received from customers at the counter and had issued those cheques himself for the amount taken.

His reason for accepting Puan Rohani's evidence it was clearly stated was because the applicant had failed to cross-examine her on these two essential points.

(3) The learned chairman had also accepted the evidence of the three other witnesses called by the respondent, namely Timah bte Taib (COW-6), Foo Ah Fook (COW-7) and Raja Som bte Raja Mansor (COW-8) all of whom had testified that they were customers of the first respondent. They had all paid their bills in cash at the counter

where the Nixdorf payment machines were being operated and where the applicant had been one of the operators, contrary to what was indicated by the Nixdorf payment machines at the counter which showed that they had paid their bills by cheques.

(4) The learned chairman had considered the applicant's side of the dispute and had disbelieved the applicant's testimony:

(i) that the applicant had not cheated the first respondent,

(ii) that the applicant had handed the bounced cheques to Ketua Kedai (COW-4),

(iii) that when the issuer of cheques, COW-2, came to get the seven cheques back, the applicant obtained them from COW-4 and handed them over to COW-2,

(iv) that the applicant then informed the Ketua Kedai that the cheques had been returned.

He gave two reasons why he disbelieved the applicant. First, he said the assertions made by the applicant were not raised during the cross-examinations by his counsel, of the relevant witnesses called by the first respondent when they gave evidence, and secondly, the applicant's letter to the first respondent had failed to mention that he had handed all the cheques to COW-4.

Subjecting the award to examination for substance

In putting forth his argument that the learned chairman had arrived at an unreasonable and irrational finding of facts in the first, third, fourth and fifth points of his submission, counsel for the applicant, it would appear had embarked on an analysis of individual paragraphs of the award in isolation and had provided his own private views why the learned chairman should have come to a different finding of facts which are favourable to the applicant. But one must always bear in mind the cardinal principle that the decider of fact whether of a court of law or of a tribunal always has the privilege of forming his own conclusion and to come to a specific finding of fact from the evidence received at the hearing before him.

The point is well expressed in the academic writing of MP Jain, at p 428 of the 3rd Ed (1997) of his book, *Administrative Law of Malaysia and Singapore*, as follows:

> The courts do not question a discretionary decision on such grounds as: whether it should have been taken or not; whether some other decision ought to have been taken; whether the decision is correct or proper, right or wrong; whether the grounds on which it is based are sufficient or not. A court does not substitute its own discretion for that of the concerned authority. Of the several options open to an authority in a given situation, it may opt for one and the courts will not sit as arbiters of the correctness or soundness of the view adopted by the concerned authority. It is not for the court to say that this, and not that, view ought to have been adopted by the authority.

Except for the sixth complaint that the learned chairman had applied the incorrect standard of proof, which shall revert to in a moment, it is clear to

me that the learned chairman had properly considered the evidence of the witnesses appearing before him and had come to the right conclusion with respect to the culpability of the applicant at least on basis of the civil standard of balance of probabilities that he had applied. The learned chairman was perfectly entitled to come to his own finding of fact as stated in his award. In particular, he was perfectly at liberty to accept the evidence of the issuer of the cheques Natkunasingam (COW-2) alone to conclude as he did that the cheques were issued by the said Natkunasingam in preference over any other evidence which may indicate otherwise.

As for the second point of the submission, I must admit that having examined the notes of evidence recorded before the Industrial Court, in particular the testimony of Puan Rohani herself, I am unable to find any evidence that supports the chairman's finding in paras 25 and 34 of the award, that the applicant's wife had approached Puan Rohani to plead for leniency. Counsel for the applicant was therefore right to submit that there was absolutely no evidence for the learned chairman to have come to this conclusion. However, the error he made in this instance, was purely factual in nature which arose from his own misconception over the existence of a particular fact which did not affect the gravamen of the charge. It was not as such an error of law of the variety that goes to jurisdiction within the meaning of 'illegality' or 'irrationality' as defined by Lord Diplock in *Civil Service Unions v Minister of Civil Service* that would require judicial intervention.

In any case the error was inconsequential as there were other materials (as alluded to earlier) upon which the chairman could legitimately rely upon to conclude as he did that the charge against the applicant had been proved on a balance of probabilities.

I shall now turn to the fourth point of the submission relating to the admission of the applicant to Puan Rohani, which in my view, points unequivocally to the guilt of the applicant. The learned chairman had considered this piece of evidence in para 25 of his award in the following manner:

> COW-5 Puan Rohani bte Ibrahim among other things informed the court that when she called the Claimant to her room and enquired about the bounced cheques, the Claimant told her that the seven cheques were issued by himself, at the counter. He then told her that he received cash at the counter and he then issued the cheques to the Company according to the collection he received from the customers.

Having examined the testimony of Puan Rohani in the context in which the admission was made, I am convinced that the applicant had admitted that he had taken the money and had substituted the seven cheques in its place. Contrary to what was submitted by counsel for the applicant, it is absolutely incorrect to say that an admission must be in writing and must be signed by the applicant. In law, the acceptance of an admission depends on its cogency and not on its form.

In the absence of any evidence that it was not given voluntarily, the chairman was entitled to act on this admission alone to decide on the

culpability of the applicant. The law is quite clear — the acceptance of the evidence of a witness cannot be subjected to review. The following passage in the judgment of Gopal Sri Ram JCA of the Court of Appeal in *William Jack & Co (M) Sdn Bhd v S Balasingam* [1997] 3 CLJ 235 at p 241 clarifies the point:

> The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran* and *Amanah Butler* may be, it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.

It goes without saying that in accepting the admission of the applicant, the learned chairman must be taken to have rejected the evidence of the applicant, that he had never received the cash and issued the cheques in substitution. I therefore fail to see how counsel for the respondent could have interpreted the option taken by the learned chairman to accept the admission, as having erred in law and in fact.

Having said that, it follows that save for the sixth point of the submission, which I shall deal with shortly, I must accept as correct the submission of counsel for the respondent, Mr Melvin Poi, that there was no element of irrationality or illegality in the finding of the learned chairman. His finding of facts, to use the words of Lord Denning in *TA Miller, Ltd v Minister of Housing and Local Government*, was logically probative, and therefore cannot be impeached.

The finding of the charge on a balance of probabilities — an error of law

Despite having creditably assessed the evidence before him, it is clear that the learned chairman of the Industrial Court had applied the incorrect test of balance of probabilities to come to the finding that the charge against the applicant had been proven and to thereby conclude that his dismissal by the first respondent was justified.

I am in complete agreement with counsel for the applicant on this point — that in cases where a tribunal finds a person guilty of a charge involving elements of dishonesty such as in the present case, it must be satisfied of that person's guilt beyond a mere balance of probabilities.

The principle has been well established. Thus in the recent case of *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 , Mohd Azmi FCJ speaking for the Federal Court ruled that:

> Where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is a criminal standard of proof beyond a reasonable doubt, and not on a balance of probabilities.

His Lordship was of course referring to civil proceedings in a court of law. But an inferior tribunal charged with the responsibility of deciding on the guilt of a person, is obliged to apply the same test. The obligation stems from the fundamental provision of art 5(1) of the Federal Constitution which provides that:

> No person shall be deprived of his life or personal liberty save in accordance with law.

A deprivation of 'life' has been interpreted in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor appeal* [1996] 1 MLJ 481, to include the deprivation of the right to employment. In that case Sri Ram JCA said at p 510:

> Quite apart from being a proprietary right, the right to livelihood is one of those fundamental liberties guaranteed under Pt II of the Federal Constitution. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan Anor* [1996] 1 MLJ 261 and the cases cited therein. The reasons for the view taken having been expressed by the majority in that case, I find it unnecessary to repeat them here. Suffice to say that the expression 'life' appearing in art 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

At first blush, the interpretation of the word 'life' in art 5(1) of the Constitution may appear to be somewhat far and wide. But in view of the fact that the Constitution does not spell out each and every aspect of the fundamental liberties of the citizen, judicial creativity in this respect was, to say the least, necessary and timely. In any case, the interpretation has now been endorsed in *R Rama Chandran* in the words of Edgar Joseph Jr FCJ at p 190:

> And 'life' in art 5(1) of the Constitution, as Gopal Sri Ram JCA in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at p 288, is wide enough to encompass the right to be engaged in lawful and gainful employment.

Now, the law in this country, as it is elsewhere in other common law jurisdictions, is that a person facing a criminal charge no matter how trivial, is presumed to be innocent until proven guilty. Under the law he has the fundamental right to be tried before a competent court exercising criminal jurisdiction which must find him guilty beyond reasonable doubt before he can be convicted. If he has to appear before any other court of law or any inferior tribunal on a civil matter the determination of which requires the prior finding of his guilt on a criminal charge, it follows that that finding must first be proved beyond reasonable doubt, in order that his right to be heard in accordance with law be not impinged, as indeed it would be if a lesser burden of proof is applied.

There is a strong rationale why the law prescribes the higher standard of proof in offences of a criminal nature, as opposed to the civil standard in civil wrongs. Whereas persons wrongly accused of civil wrongs can be compensated by damages and other suitable remedies, the damage and stigma that befalls a person who is found guilty of a criminal offence is irreversible and is likely to remain with him for the rest of his life. Before a person can be pronounced guilty of a charge therefore, the court or tribunal must be very sure of his guilt. Thus in *Sabah Plantation Industry Employees' Union v Sama Subur Sdn Bhd, Tawau & Anor* [1995] 2 MLJ 378 where the High Court had to rule whether the Industrial Court was right in its ruling to uphold the dismissal of an employee who had participated in an illegal strike which constitutes a criminal offence, Abu Mansor J (as he then was)

granted an order of certiorari to quash its decision on the ground, inter alia that:

> It was also clear that the finding of guilt for the alleged crimes were not on a standard of beyond reasonable doubt, but merely on a balance of probabilities.

Abu Mansor J in that case was referring to criminal offences in general; a fortiori, where the crime involves elements of dishonesty as in the present motion.

In order to decide whether the applicant had been dismissed without just cause the Industrial Court must first decide on the guilt of the applicant. Having taken upon itself to decide on the guilt of the applicant, it follows that it is now obliged to apply the same stringent requirement of proof beyond reasonable doubt as if the applicant had been tried in a court of law exercising criminal jurisdiction. In applying the lower standard of proof, it had impinged on the constitutional right of the applicant and in the process, committed an error of law.

What constitutes in substance an error of law has been laid down in a number of recent Court of Appeal decisions, notably, in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, wherein at p 342 Gopal Sri Ram JCA said:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (What may be conveniently termed an *Anisminic* error) or if he miscontrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

More appropriately however, an error of law arising out of the failure to apply the correct standard of proof falls under Lord Diplock's definition of 'illegality' in *Civil Service Unions v Minister for Civil Service* [1985] AC 374 at pp 410–411, as approved and applied in *R Ramachandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. This was what Lord Diplock said:

> By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or has not is par excellence a justiciable question to be decided, in the event of a dispute, by those person, the judges, by whom the judicial power of the state is exercisale.

Viewed from the standpoint of a denial of the fundamental right of the applicant to be heard in accordance with law under art 5 of the Federal Constitution, the error of law could also fall within the other category described as 'procedural impropriety' by Lord Diplock in the same case as follows:

> I have described the third head as 'procedural impropriety' rather than a failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is

> because susceptibility to judicial review under this head covers also failure by an administrative body to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

The consequence of the error of law

Formerly, in the light of the privative clause in s 29(3)(a) of the Industrial Relations Act 1967 (which provides that an award of the Industrial Court shall be final and conclusive and that no award shall be challenged, appealed against, review, quash or called in question in any court of law), there was a need to distinguish whether the error committed by the learned chairman was merely an error of law on the face of the record or an error going to jurisdiction — for only an error of law going to jurisdiction would be amenable to judicial review. That was the law as propounded in the Privy Council case of *South East Asia Fire Bricks Sdn Bhd v Non-mettalic Mineral Products Manufacturing Employees Union & Ors* [1981] AC 363 which in turn had relied on the House of Lords case of *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

The situation is now different. The restrictive principle in *South East Asia Fire Bricks* on privative clauses has now been effectively overruled by the very recent Federal Court decision in *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 MLJ 1 following the pace of reform set initially by the Court of Appeal in *Syarikat Kenderaan Melayu* in favour of discarding the distinction. The ruling and rationale appears in the following passage at p 45, per Edgar Joseph Jr FCJ writing for the panel:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* (ibid) at p 70, 'no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.

Having found that an error of law had been committed by the Industrial Court, it follows that its decision must accordingly be quashed.

Whether a consequential order of reinstatement or compensation should be made

Finally there is an ancillary but no less important issue that must now be considered. It was argued by counsel for the applicant that following the Federal Court decision in *R Ramachandran v Industrial Court of Malaysia & Anor*, apart from merely remitting the case back to the Industrial Court for a rehearing according to law, this court should go on a 'forward march of judicial review', to exercise its discretion to reinstate or to compensate the applicant in lieu of reinstatement — this, notwithstanding that no such prayer was made in the present motion.

The core of the majority decisions of the Federal Court (Wan Yahya FCJ dissenting) favouring the view that the court has the discretion

to use its inherent power in deserving cases to grant the consequential order are to be found in the following passages from the speeches of His Lordships Eusoff Chin CJ and Edgar Joseph Jr FCJ as follows:

> Per Eusoff Chin CJ at pp 184–185: 'As far as possible, the anxiety and endeavour of the court should be to remedy an injustice when it is brought to its attention. On the facts of the case before us, to remit this matter back to the Industrial Court would mean to prolong the dispute, which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demands that to avoid further delay and expense, the court should determine the consequential relief rather than remit the case to the Industrial Court for that purpose.'
>
> Per Edgar Joseph Jr FCJ at p 227: 'In appropriate circumstances, such as obtained here, our High Courts have the power not merely to quash an Award of the Industrial Court but to go on to make a finding that an employee has been dismissed from service without just cause or excuse, and when necessary, to award fair compensation'.
>
> Per Edgar Joseph Jr FCJ at p 198: 'In the very special circumstances of this case, to remit the case to the Industrial Court to assess the monetary compensation payable by the Employer to the Employee would seem to be a certain detachment from reality and, more importantly, it will not answer the needs of justice. We must, therefore, do what the Industrial Court should have done. It follows therefore, that for the reasons stated above, I have no quarrel with the consequential orders proposed by the learned Chief Justice and concur in their making. In doing so, I trust that we have pointed the way to new horizons in the forward march of Judicial Review.'

First and foremost it must be appreciated that the inherent jurisdiction of the court involves the exercise of judicial discretion which must be founded on some compelling reasons that require the intervention of the court in the interest of justice. It follows therefore a consequential order need not follow in all cases where the decision of the inferior tribunal is quashed. Indeed, the main reason which had compelled the Federal Court in *R Ramachandran* to assume the jurisdiction of the Industrial Court to award compensatory relief to the employee in that case was glaringly, the injustice that had been meted out to him by the respondent employer through the devious pretext of unjustly terminating his service under the guise of a retrenchment exercise, more elaborately described in the following passage of the speech of Edgar Joseph Jr FCJ at p 228 of the judgment as follows:

> To recapitulate, the case for the employee at all levels, in effect, was that the act of the employer in terminating his services by the letter dated 20 April 1998, although ostensibly in pursuance of a retrenchment exercise was really a device to cloak a mala fide exercise of power or, in other words, an act of victimization, thus avoiding a fair enquiry into certain baseless allegations of misconduct which the Employer had no intention of pursuing. Indeed, the learned Judge in the High Court had found that the Employer had decided to give the Employee the benefit of the doubt regarding them. In other words, the case for the Employee was that this was not a redundancy situation at all; the letter of termination was really a cover up for the Employer's inability to establish those allegations by fair enquiry and the ulterior purpose of the exercise was to get rid of the Employee because 'he was an evil to be eliminated'. Counsel for the Employee relied on the Indian Supreme Court

decision of *L Michael & Anor v M/s Johnson Pumps India Ltd* [1975] I LLJ 262 to support this point.

I am unable to find any compelling reason why a consequential order should be made in favour of the applicant. Having examined the substance of the award of the learned chairman of the Industrial Court, it is clear to me that there were sufficient materials to find as he did that the charge against the applicant proved on a preponderance of probabilities — and possibly even on the higher balance of beyond reasonable doubt, a question which the Industrial Court alone would be in a position to determine. The only reason why his award has to be quashed is because by applying the lower standard, the fundamental right of the applicant to be heard by the higher standard had been infringed, which for the reason adverted to earlier, constituted an error of law. To order the first respondent to reinstate or to compensate the applicant under the circumstances, would be most inappropriate, unjust and irrational. Fairness, it must be said, applies equally to both the employee and the employer.

The order

The award of the Industrial Court is quashed, with a directive that the charge against the applicant be reheard and determined by the higher standard of beyond reasonable doubt.

Order accordingly.

Reported by Jafisah Jaafar